The Senate: appointments
under section of 26 of
the Constitution Act, 1867

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THE SENATE: APPOINTMENTS UNDER SECTION 26 OF THE CONSTITUTION ACT, 1867

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OVERVIEW

Sections 26, 27 and 28 of the Constitution Act, 1867 provide for the appointment of four or eight additional senators, upon the direction of the Queen. Until September 1990, however, the power had never been exercised, and questions have arisen as to when such additional appointments can be made appropriately.

When the Constitution Act, 1867 was drafted, there was considerable debate as to whether to include a "deadlock provision" that would allow the government of the day to appoint additional senators in case the Commons and the Senate should ever irreconcilably differ. Sir John A. Macdonald, opposing the concept, argued that such a "swamping" provision could destroy the independence and utility of the Senate. At the London Conference of 1866, where the actual drafting took place, however, the other delegates were divided on the issue.

The British government was adamant that a deadlock provision be included, and so section 26 was eventually drafted and approved. The colonial delegates insisted, however, that the additional appointments be regionally apportioned, that they be strictly limited in number, and that the final decision rest with the Crown rather than the government of the day. The British government accepted these restrictions, although it expressed some concern about the last two.

Prior to the recent occurrence, there is only one documented case of a prime minister trying to use section 26. In 1873, Alexander Mackenzie requested the appointment of six extra senators, but the Colonial Secretary declined to so advise Her Majesty. The Earl of Kimberley decided

that section 26 was to be used only when there was a collision of opinion between the two Houses of so serious and permanent a character that the government was paralyzed or incapacitated. Additionally, it had to be at least possible, and perhaps probable, that the extra appointments would resolve the problem.

Since section 26 was not used until 1990, the mechanics of the appointments are not entirely clear. - For example, none of the supplementary appointments can be from Newfoundland or the Territories, as these are not included in the existing divisions of the Senate. Appointments from Ontario would seem simple enough, but the Maritime and Western Divisions are more problematic. Assuming, for example, that new senators have been appointed from New Brunswick and Nova Scotia, what happens if the next vacancy arises in Prince Edward Island? Because of section 27, the Prince Edward Island vacancy cannot be filled until the Maritime Division is reduced to 24 members. Similarly, each Quebec senator represents one of 24 electoral districts, and this could be difficult to reconcile with the appointment of additional senators.

Finally, the issue of additional senatorial appointments is complicated by the fact that section 26 reserved the power of extra appointments specifically to the Crown, at the insistence of the Canadian delegates to the London Conference in 1866. Since the Statute of Westminster, 1931, however, the Queen (or the Governor-General acting in her stead) has been constitutionally required to accept the advice of her Canadian Ministers. Consequently, a power of appointment that was broadly phrased in anticipation that the Queen would receive independent advice and act as the final arbiter, is now within the power of the prime minister of the day.

LEGISLATIVE HISTORY OF SECTION 26

The constitutional provisions surrounding the structure and powers of the Senate were not taken lightly by the framers of Confederation. Indeed, one of the delegates to the London Conference of 1866, at which the actual drafting of the Constitution Act, 1867 took place, later

stated that "this question as to the constitution of the Senate occupied more time than any other portion of the bill. [We] were fully a week in discussing it."(1)

Although the possibility of a deadlock between the two Houses of Parliament was considered in the negotiations between the colonies, no provision was made for the appointment of extra members in the original Quebec Resolutions of 1864. These resolutions were agreed to by representatives of five colonies -- Canada (Upper and Lower), Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland -- although only Canada followed through with legislative approval.

When these original resolutions were introduced into the Legislative Assembly of Canada the following year by John A. Macdonald, then Attorney General West, he commented at some length on the relationship between the two Houses:

> The provision in the Constitution, that the Legislative Council [Senate] shall consist of a limited number of members, that each of the great sections shall appoint twenty four members and no more, will prevent the Upper House from being swamped from time to time by the ministry of the day, for the purpose of carrying out their own schemes or pleasing their partisans. . . The objection has been taken that in consequence of the Crown being deprived of the right of unlimited appointment, there is a chance of a dead lock arising between the two branches of the legislature; a chance that the Upper House being altogether independent of the Sovereign, of the Lower House, and of the advisors of the Crown, may act so independently as to produce a dead lock. I do not anticipate any such result. In the first place we know that in England it does not arise. There would be no use of an Upper House, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from

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(1) Senate, Debates, 19 March 1877, p. 202 (Mr. Wilmot).

> that body, but it will never set itself in opposition against the deliberate and understood wishes of the people.(2)

Although Macdonald rested his case on the unlikelihood of a deadlock occurring, it is also possible that the decision not to allow additional appointments under any circumstances was influenced by the dangers of upsetting the delicate balance between regional, linguistic, and sectarian interests in the proposed composition of Parliament.

The first reference to a provision allowing for the appointments of extra senators in case of deadlock seems to occur in a letter to Governor General Monck, late in 1864, commenting on the Quebec Resolutions: "Her Majesty's Government are anxious to lose no time in conveying to you their general approval of the proceedings of the Conference. There are, however, two provisions of great importance that seem to require revision."(3) One of these is the constitution of the Legislative Council: "if the Members be appointed for life, and their number be fixed, [will there] be any sufficient means of restoring harmony between the Legislative Council and the Popular Assembly."(4)

Throughout, it appears to have been the British Government that insisted on some mechanism for breaking a possible deadlock between the two Houses. During a later debate in the Senate, Mr. R.D. Wilmot, one of the New Brunswick delegates to the London Conference in 1866, gave a detailed description of negotiations surrounding section 26.(5) The delegations from the colonies were narrowly divided upon whether a deadlock provision should be added to the Constitution. Three times the delegates

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(2) Canada, Legislature, Parliamentary Debates on the Subject of Confederation, Hunter, Rose & Co., Quebec, 1865, p. 36.

(3) G.P. Brown, ed., Documents on the Confederation of British North America, The Carleton Library No. 40, McClelland and Stewart, Toronto, 1969, p. 171. The first problem mentioned concerns the Crown's prerogative of pardon.

(4) Ibid.

(5) Senate, Debates, 19 March 1877, p. 203-204.

adhering to the Quebec scheme prevailed, and three times the Chairman of the Conference (Sir John A. Macdonald), so informed Lord Carnarvon. Three times Lord Carnarvon, the Colonial Secretary, stated his preference for a deadlock provision. Finally, amidst considerable debate, the delegates adopted "the 26th clause as a safety-valve in the event of a deadlock."(6)

Aside from the dispute over the principle involved, there was also discussion as to the exact form the safety-valve should take. Nova Scotia and New Brunswick in particular were concerned that additional appointments might allow Upper Canada to swamp the other provinces. The solution was to provide that additional appointments must be made equally from the three divisions: Ontario, Quebec and the Maritimes. Even this did not allay Quebec's concerns, however, since one senator was supposed to be appointed from each of the 24 electoral divisions of Lower Canada:

> If you give power to swamp the Legislative Council then you destroy its utility. Lower Canada insists that each of its present divisions shall have a representative in the Council, that is the existing divisions. If you give power to the Central Government to increase the number you change the proportions. This has been settled to the satisfaction of Roman Catholics and Protestants, British and French.(7)

In early January 1867, the delegates made a new proposal. Additional appointments to the Senate could be made, provided that they were made equally from the three sections of Canada, when the Senate rejected a money bill once, or any other bill three times, provided that at third reading in the Commons an absolute majority of members from two out of the three sections had voted in favour of the bill.(8)

In a memo to the British Cabinet, Lord Carnarvon noted two other conditions added by the delegates: that the appointments should be made by the Crown, rather than the Governor General; and that their number

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(6) Ibid., p. 203.

(7) Brown (1969), p. 212.

(8) Ibid., p. 263.

should not exceed six. He added that "the intervention of the Crown is to my mind a doubtful proposal: but it is designed to be a check upon popular feeling and the action of the Local Government and I do not see that we can take exception to it."(9) Accordingly, the third draft of the British North America Bill reads as follows:

> 16. If any Money Bill passed by the House of Commons is rejected by the Senate for any one Session, or if any other Bill passed by the House of Commons is rejected by the Senate on three consecutive occasions, and if in such case or cases the Governor-General shall ascertain that such Bill or Bills has or have been carried by the majority of voices from two out of the three divisions of the Kingdom, then and in such case it shall be lawful for Her Majesty to create additional Members of the Senate, preserving the rule of equality between three Divisions of Upper Canada, Lower Canada and the Maritimes.(10)

The next section provided that, when the number of senators had been so increased, no further appointments to any division would be made in the normal course of events until that division had again dropped to 24 members.

The Fourth Draft of the bill simplified the provisions for the appointment of additional senators:

> 20. On the application of the Government of Canada, Her Majesty in Council may from time to time sanction an appointment of additional Senators, so as that the whole number shall in no case exceed seventy-eight, the proportion allotted to each of the three divisions being preserved. In case of vacancies after any such increase above seventy-two; no appointment shall be made without the sanction of the British Government till the whole number is reduced below seventy-two.(11)

The final form of the deadlock provisions in the Constitution Act, 1867 was as follows:

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(9) Ibid., p. 264.

(10) Ibid., p. 268.

(11) Ibid., p. 283.

> 26. If at any Time on the Recommendation of the Governor-General the Queen thinks fit to direct that Three or Six members be added to the Senate, the Governor-General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.
>
> 27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-Four Senators and no more.
>
> 28. The Number of Senators shall not at any Time exceed Seventy-Eight.

The British government presumably remained less than happy, both with the involvement of the Crown and with the limited number of extra appointments, but the compromise appeared to be the best possible. In introducing the British North America Act in the British House of Lords, Lord Carnarvon stated:

> [Senators] will be nominated by the Governor General in Council for life. But as it is obvious that the principle of life nomination, combined with a fixed number of members, might render a difference of opinion between the two Houses a question almost insoluble under many years, and might bring about what is popularly known as a legislative dead-lock, a power is conferred upon the Crown -- a power, I need not say, that would only be exercised under exceptional and very grave circumstances -- to add six members to the Senate, subject to the restriction that those six members shall be taken equally from the three sections, so as in no way to disturb their relative strength, and that the next vacancies shall not be filled up until the Senate is reduced to its normal number. It may, perhaps, be said that the addition of six members will be insufficient to obviate the legislative discord against which we desire to provide. I am free to

> confess that I could have wished that the margin had been broader.(12)

As Canada grew, the carefully crafted compromise on the deadlock provision required amendment to allow for the addition of new provinces. The original Act of 1867 had made provision for the number of senators allocated to Newfoundland and Prince Edward Island in the event of their later admission to the Union,(13) but had not made provision for the western provinces. Prince Edward Island was to have four senators and be included in the Maritime Division, with Nova Scotia and New Brunswick each giving up two seats so that the total representation of the Maritime division remained at 24. Newfoundland also was to be allocated four senators, but was not included in any division. According to Sir John A. Macdonald:

> It has, comparatively speaking, no common interest with the other Maritime Provinces, but has sectional interests and sectional claims of its own to be protected. It, therefore, has been dealt with separately, and is to have a separate representation in the Upper House, thus varying from the equality established the other sections.(14)

When Manitoba was formed in 1870, it was given two members in the Senate, with provision for two additional senators as the population grew. British Columbia joined Canada in 1871 with three senators. Alberta and Saskatchewan entered Confederation in 1905 with four members each, and a provision for adding two more each after the next census. Finally, in 1915, Parliament rationalized western representation in the Senate by a

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(12) Quoted by Senator MacPherson in Senate, Debates, 19 March, 1877, p. 215-216. Lord Carnarvon also notes, as did Sir John A. Macdonald in the 1865 Debates, the potentially high turnover of senators, even with lifetime appointments: in 1856 there were 42 nominated or life members of the pre-Confederation Legislative Council of Canada who answered to the call. By 1862, only 25 were left, and, according to Sir John, by 1864 only 21. This suggestion that "six additional members. . . supplemented by so large and so regular a change in the constitution of the Senate [may be enough] to maintain the legislative harmony of the two Houses," does not seem to have been adopted with any enthusiasm by either side in the Senate debates.

(13) Constitution Act, 1867, s. 147.

(14) Parliamentary Debates, 1865, p. 35.

constitutional amendment. Each of the four western provinces was to have six members in the Senate, forming a western division of 24 to parallel the Ontario, Quebec and Maritime divisions.(15) The number of existing senators was therefore increased from 72 to 96.

Because there were now four divisions instead of three, the number of senators who could be appointed under section 26 became four or eight, rather than three or six. The wording of section 27 was also changed slightly to state that, if additional senators were appointed, no new senators could be summoned to represent a division until the size of that division was reduced to 24.

The number of senators to which Newfoundland was entitled upon admission to Confederation was raised from four to six, so that the total number of senators provided for by the Constitution Act, 1867, as amended, became 102. The maximum number allowable if section 26 were used became 110.

In 1975, the Constitution was again amended to provide for the appointment of one senator each to represent the Yukon and Northwest Territories.(16) There have been no further amendments affecting the constitution of the Senate, and the limits on the number of senators remain as follows:

> 21. The Senate shall, subject to the Provisions of this Act, consist of One Hundred and four Members, who shall be styled Senators.
>
> 28. The Number of Senators shall not at any time exceed One Hundred and Twelve.

There are four divisions of the Senate: Ontario; Quebec; the Maritime provinces of Nova Scotia, New Brunswick and Prince Edward Island; and the Western provinces of Manitoba, British Columbia, Saskatchewan and Alberta. Section 26 allows for one or two additional

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(15) Constitution Act, 1915, 5-6 Geo. V., c. 45 (U.K.) Act. Section 22 of the Constitution Act, 1867, as amended, creates the Divisions of the Senate.

(16) Constitution Act (No.2), 1975, S.C. 1974-75-76, c. 53.

members to be appointed from each division if the Queen thinks fit on the recommendation of the Governor General. Once these appointments are made, no further appointments can be made to any of the four divisions until that division has been reduced through attrition to its normal complement of 24.(17)

UNDER WHAT CIRCUMSTANCES CAN SECTION 26 BE INVOKED?

In 1873, the Macdonald government resigned over the Pacific Scandal and the Mackenzie government took office on 2 November 1873. Mackenzie prorogued Parliament the same day, and dissolved it on 2 January 1874. On 22 January 1874, the Mackenzie Liberals were returned with a resounding majority.

Meanwhile, in late December, 1873, Mackenzie and his Cabinet advised the Governor-General to recommend to the Queen the appointment of six extra senators. The request seems to have been accompanied by a memorandum from the Prime Minister outlining the reasons for the request.(18) Mackenzie described the purpose of section 26 as "a way to avoid possible complications or inconveniences by giving some elasticity to the system." He refers to the pre-Confederation agreement between the leaders of the two political parties that each party should nominate half of the original senators, and observes that 29 of the 31 senators appointed since 1867 were on the Conservative side.

Although Mackenzie did not go so far as to argue that Senate appointments must maintain the principle of equal representation between the parties, he felt it was important to prevent an impression that the

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(17) Section 27 envisages the possible re-use of section 26 provided the number of senators does not exceed 112. The circumstances under which this could take place are, however, obscure.

(18) The circumstances surrounding the request and the accompanying documents are fully dealt with by Eugene Forsey in two articles: "Alexander Mackenzie's Memoranda on the Appointment of Extra Senators, 1873-4," 27 Canadian Historical Review (1946), p. 189-194; and "Appointment of Extra Senators Under Section 26 of the British North America Act," 12 Canadian Journal of Economics and Political Science (1946), p. 159-167.

Senate was "too much the creation of the Administration of the day." Because of the disparity of the Macdonald appointments, "a sufficiently clear case [had] been established to justify the application of the counterpoise provided by the Constitution." Additionally, the extra appointments would ensure that government measures were effectively advocated in the Senate.(19)

The Governor-General, Lord Dufferin, forwarded the request to Lord Kimberley, the Secretary of State for the Colonies, on 26 January 1874, immediately after it became clear Mackenzie had won the election. On 18 February 1874, Lord Kimberley replied that he could not advise Her Majesty to direct the additional appointments. He noted that the "question was of considerable importance," but felt that the intention of the framers of section 26 was that the power of extra appointments should "be vested in Her Majesty in order to provide a means of bringing the Senate into accord with the House of Commons in the event of a collision of opinion between the two Houses." Consequently, Her Majesty could be advised to use it only when "a difference had arisen between the two Houses of so serious and permanent a character, that the Government could not be carried on without Her intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy."(20)

In short, section 26 was to be used only when there was a collision of opinion between the two Houses of so serious and permanent a character that the government was incapacitated. Additionally, it had to be at least possible, and perhaps probable, that the extra appointments would resolve the problem.

There the matter apparently would have rested, since the correspondence was not public, except for a chance remark by the Governor-General in the summer of 1876. On a visit to British Columbia, Lord Dufferin found considerable dissatisfaction with Canada. There had been

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(19) When the issue was later debated, the Conservatives argued that six or seven of some 32 post-Confederation appointments had been Liberal (Senate, Debates, 19 March 1877, p. 210).

(20) Senate, Journals, 1877, p. 77.

delays in the construction of the Pacific Railway, and a bill to provide for the Esquimault and Nanaimo Railway in compensation had been defeated in the Senate. In an attempt to assure British Columbians that the government had made every effort to have the Esquimault and Nanaimo bill passed, Lord Dufferin made the following statement which was widely reported in the press:

> I saw Mr. Mackenzie the next day [after the defeat of the bill], and I have seldom seen a man more annoyed or disconcerted than he was. Indeed he was driven in that interview to protest with more warmth than he has ever used against the decision of the English government which had refused, on the opinion of the law officers of the Crown, to allow him to add to the numbers of the Senate.(21)

Subsequently, motions were introduced in both the House and the Senate requesting the production of all correspondence relating to this request for additional senators.

Having received the documents in question, the Conservative majority in the Senate was not prepared to let the matter lie. On 19 March 1877, the Senate passed a resolution expressing "its high appreciation of the conduct of Her Majesty's Government in refusing to advise an Act for which no Constitutional reason could be offered." In addition, the Senate recorded its opinion on the appropriate use of section 26:

> this power was only intended to be exercised upon the occurrence of some grave political emergency, and with a view to the removal of serious differences which should actually have arisen between the Senate and the other House of Parliament, and are not susceptible of satisfactory adjustment by any other means; and
>
> any addition to the Senate under the provisions of the 26th clause of the British North America Act which is not absolutely necessary for the purpose of bringing this House into accord with the House of Commons, in the event of an actual collision of a serious and permanent character, would be an infringement of the constitutional independence of the Senate, and lead to

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(21) House of Commons, Debates, 1 March 1877, p. 371.

> a depreciation of its utility as a constituent part of the Legislature.(22)

This appears to be the last official documentation relating to the purpose and appropriate use of section 26.(23)

CONCLUSIONS

Most commentators agree that section 26 was intended to be used only in the event of a serious deadlock between the Houses.(24) In the event of such a collision of wills, it was to be for the Crown to decide whether the circumstances involved justified invoking the deadlock mechanism.

Prime Minister Mackenzie tried an alternative approach to section 26 in 1873, when he asked the Queen to appoint six extra senators on the grounds that the provision was designed only to "find a way to avoid possible complications or inconveniences by giving some elasticity to the system." Lord Kimberley, the Colonial Secretary, rejected the request, following the narrower and more traditional interpretation.

However, at least three factors make a modern interpretation of section 26 more difficult than the legislative history would suggest. Foremost is the constitutional evolution of Canada, whereby the role of the

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(22) Senate, Journals, 19 March 1877, p. 130; see also Senate, Debates, 19 March 1877, p. 194.

(23) A.B. Keith suggests that Sir Wilfred Laurier may have informally inquired whether he could make extra appointments, but does not give a source for the information: "Sir Wilfred would have liked to have the deadlock provisions put in force, but his tentative inquiry in England in 1900 satisfied him that he would not be accorded this favour." Responsible Government in the Dominions, Clarendon Press, Oxford, 1928, Vol. I, p. 463.

(24) For example, W.R. Riddell, The Canadian Constitution in Form and Fact, New York, Columbia University Press, 1923, p. 24; J.G. Bourinot, Parliamentary Procedure and Practice, Montreal, Dawson Brothers, 1892, p. 141; A.B. Keith, Imperial Unity and the Dominions, Oxford, Clarendon Press, 1916, p. 392; R. MacGregor Dawson, Democratic Government in Canada, University of Toronto Press, Toronto, 1949, p. 63.

Crown has been reduced to that of a constitutional figurehead acting on the advice of Her Canadian Ministers. When section 26 was drafted, those delegates who did not want a deadlock provision for fear of the government swamping the Senate seemed to have compromised with the idea of the Crown as an ongoing arbiter. With that arbiter removed, the concept of an objective third party to mediate between the Commons and Senate, as envisaged by the delegates to the London Conference, no longer exists.

Second, the wording of section 26 is very broad and, unlike an earlier draft, contains no clear test of when the power of appointment can be invoked. Presumably, the delegates felt that no clear test was necessary since the ultimate power was in the hands of the Crown and, as Lord Kimberley stated in 1874, the Queen would interfere only in the most serious circumstances. On the face of the section, however, a prime minister can invoke it at any time.

Third, although section 26 is constitutional law, it comes very close to concepts more usually associated with constitutional convention. Eugene Forsey, in what remains the most extensive article on section 26, suggests that the power to appoint additional senators involves principles and conventions that "still have to be worked out, and they will have to be worked out without much help either from our own or British history."(25)

He notes, for example, that there are times when a Governor General would be entitled to reject even a usual Senate appointment, such as if a government defeated at the polls tried to fill Senate vacancies before the new government took office. He also suggests that there are times when a government would clearly be entitled to make section 26 appointments in the absence of any conflict with the Senate, such as if a government were elected with no Senate representation.

Regardless of those comments, it seems clear that the original intent of section 26 was to provide a "deadlock" mechanism in the event of an irreconcilable clash of wills between the two Chambers. The fact that no such clash occurred in the first 120 years after Confederation invalidates neither the purpose nor the use of section 26 in the appropriate circumstances.

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(25) Forsey, "Appointment of Extra Senators under Section 26..." (1946), p. 166.


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